THE

AMERICAN LAW REGISTER.

APRIL, 1853.

LIENS.

As the doctrines concerning common law lien appear to have influenced in a measure many of the decisions upon this subject, though the cases themselves were cognizable in other tribunals, a few remarks upon the lien at law may be desirable.[1]

Liens were most probably introduced into the English, as well as the Continental law, from that of Rome.[2] This right was originally

[1] A writer in the London Law Magazine, November, 1852, cites a late unreported case, as illustrating "the inveterate confusion" (as he calls it) in some judicial minds "of the two sorts of lien;" *i. e.*, maritime and at law.

[2] A very brief notice of some of the provisions of the Justinian code with regard to liens may not be amiss.

The lien, known by the different names of Pignus legale, Pignus quod tacite contrahitur, and Privilegium, (D. 42, 5, 16; De rebus. auct. jud. poss. et al.) which was carefully distinguished, in its inception, from the Mortgage or Pawn, (D. 20, 1; De Pig. et Hyp.) as was also the Pledge from the Lien in our own early law, (compare Glanvil x. 6, 7, 8, with the Year Book, 5th Ed. iv. 2,) was the right to enforce payment out of the thing itself, (C. 8, 14, 18,) whether land or chattel, upon the faith of which the credit was given. This right derived its existence from the law, was incorporated with the rem by virtue of its tacit pact, and was, unlike the Pignus or Hypotheca, in no respect dependent upon a contract or agreement for its recognition. D. 42, 5, 16, et seq.; 4 Poth. Pand. 35, Art. 2.

founded on the obligation, which the law imposed upon the lien man, to receive the goods, or, with innkeepers, the guest, for the exercise

Liens took precedence among themselves according to their nature, and not to the time when they respectively occurred; but, in regard to those of equal dignity, they ranked in order of time. D. 42, 5, 16; 4 Poth. P. 37, Scc. 35. Privilegia non tempore aestimantur, sed ex causa. Et, si ejusdam tituli fuerunt, concurrunt; licet diversitates temporis in his fuerunt. But they took precedence absolutely as against creditors without lien, or whose security was by contract, (D. 20, 4, 5.) Interdum posterior potior est priore; utputa si in rem istam conservandum impensum est, quod sequens credidit, veluti si navis fit obligata, et armandam eam rem vel reficiendam ego credidero. So also dower or marriage portions, (Nov. 97, Ch. 3, Τουτοις) (4 Poth. P. 36, D. 42, 5, 31. Dabimus ex his causis ipsi mulieri privilegiam.—Ulpian), were to be preferred to prior mortgages (C. 8, 18, 12, qui pot.), or to the creditor whose money had been expended in the purchase of the lands, or repairs of the tenements. (Nov. 97, Ch. 3.) Scimus quasdam hypothecas, etsi posteriores, ex privilegiis a legibus illis concessis præponi antiquioribus creditoribus, veluti quando quis pecunia sua navem fabricavit, vel eam emi, frabiicari aut reperari, vel dominum forte ædificari, vel agrum aut aliud quid emi curaverit, &c. A vendor had a lien for unpaid purchase money. D. 18, 1, 19. Quod vendidi; non aliter fit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum, vel etiam fidem habuerimus emtori sine ulla satisfactione. (Quod vendidi et non tradidi, says the Vulgate, cited note to Kriegel, and also in Beck's edition, agreeing with our law of stoppage in transitu. Contra, Gothofred, Pothier, Domat, &c.) D. 18, 1, 53. Vid. et I. 2, 1, 41. D. 19, 1, 13, Sec. 8. Venditor enim quasi pignus retinere potest eam rem, quam vendidit. And the lender for the consideration money. D. 42, 5, 26, Paulus. Qui in navem exstruendam, vel instruendam credidit, vel etiam emendam, privilegium habet. C. 8, 18, 7. Impp. Diocletianus et Maximianus. Licet iisdem pignoribus multis creditoribus diversis temporibus datis, priores habeantur potiores, tamen cum, cujus pæcunia prædium comparatum probatur, quod ei pignori esse specialiter statim convenit, omnibus antiferri, juris auctoritate declaratur. C. 8, 14, 17. Quamvis ea pecunia, quam a te mutuo frater tuvit accepit, compararit prædium, tamen, nisi specialiter vel generaliter hoc tibi obligavit, tuæ pecuniæ numeratio in causam pignoris non deduxit. Sane personali actione debitum apud præsidem petere non prohibens; and the lender of money, either to the owner, or to the contracter with the owner's knowledge, for repairs or preservation, or improvements; though, in this last case, some civilians (Dom. 3, 1, 5, 8) think that the lien did not extend to the corpus rei, but was confined to the improvements themselves. D. 42, 5, 24, Sec. 1. Divus Marcus—Creditor, qui ob restitutionem ædificorum crediderit, in pecunia, quæ credita erit, privilegium exigendi habebit; quod ad eum quoque pertinet, qui redemtori domino mandante pecuniam subministravit. See also D. 42, 5, 26. Qui in navem exstruendam, &c., cit. ante. D. 12, 1, 25. Creditor, qui ob restitutionem ædificorum

of some act or duty, such as care, custody, or carriage; and justice therefore required that he should have a competent remedy for his

crediderit, in pecuniam, quam crediderit, privilegium exigendi habibit. D. 42, 3, 1. Ulpianus—Creditori, qui ob restitutionem ædificiorum crediderit, privilegium exigendi datur. See also D. 20, 4, 5, where the equipment or refitting a ship is instanced as an example. Also D. 20, 4, 6. Also D. 42, 5, 34. Marcianus—Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ causa, vel quoque modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum. See also D. 20, 2, 1. Also builders, contractors, material-men, mechanics, or bailees for hire, who, by bestowing time, labor or care, or giving shelter, had made, protected, repaired, or bettered the subject of the lien, carriers, innkeepers, mariners, agisters, (unlike the common law. Cro. Car. 271, Ld. Ray, 866), owner of a farm upon the fruits unsevered and unsold, ground-rent landlord upon both fruits and estate, householder upon the goods of his tenant for rent and damage, under-tenants pro tanto, but not of boarders, or on storage; funeral expenses, and costs of court; vide auth. cit. ante; also D. 20, 2, 1. Senatus consulto; pignus insulæ creditori datum, qui pecuniam ob restitutionem ædificii exstruendi mutuam dedit, ad eum quoque pertinebit, qui redemtori domino mandante nummos ministravit. D. 20, 4, 6, Sec. 1, 2. Hujus enim pecunia salvam fecit totius pignoris causam; quod poterit quis admittere, et si in cibaria nautarum fuerit creditum, sine quibus navis salva pervenire non poterat. 1. Item si quis in merces sibi obligatas crediderit, vel ut salvæ fiant, vel ut naulum exsolvatur, potentior erit, licet posterior sit; nam et ipsum naulum potentius est. 2. Tantundem dicetur, et si merces horreorum, vel areæ, vel vecturæ jumentorum debetur; nam et hic potentior erit. D. 20, 2, 7. In prædiis rusticis fructus, qui ibi nascuntur, tacite, intelliguntur pignori esse domino fundi locati, etiam si nominatim id non convenerit. 1. Videndum est, ne non omnia, illata vel inducta, sed ea sola, quæ, ut ibi sint, illata fuerint, pignori sint, quod magis est. D. 20, 4, 15. Paulus ad Edictum. Etiam superficies in alieno solo posita pignori dari potest, ita tamen, ut prior causa sit domini soli, si non solvatur ei solarium. D. 20, 1, 31. Scaevola. Lex vectigali fundo dicta erat, ut, si post certum temporis vectigal solutum non esset, is fundus ad dominum redeat; postea is fundus a possessore pignori datus est: quæsitum est, au recte pignori datus est? Respondit, si pecunia intercessit, pignus esse. Item quæsiit, si quam in exsolutione vectigalis tam debitor, quam creditor cessassent, et propterea pronuntiatum esset, fundum secundum legem domini esse, cujus potior causa esset? Respondit, si, ut proponeretur, vectigali non soluto jure suo dominus usus esset, etiam pignoris jus evanuisse. D. 20, 2, 4. Neratius. Eo jure utimur, ut quæ in prædia urbana inducta, illata sunt, pignori esse credantur, quasi id tacite convenerit. C. 11, 71, de locatione, &c. I. 3, 2, 4, de locatione. D. 20, 2, 2. Marcianus. Pomponius. Non solum pro pensionibus, sed et si deteriorem habitationem fecerit culpa sua inquilinus, quo nomine ex locato cum eo erit actio, invecta et illata pignori erunt obligata. D. 20, 1, 32. Scævola. Eos duntaxat, qui hoc animo a domino inducti

charges.[1] The surest and least circuitous that could be thought of, was the detainer of the articles, or the person of the guest, until payment.[2] The liability begat the lien. But as tradesmen, artificers, and persons of the like character, were bound by law to the due exercise of skill, care, and industry in their respective occupations, the rule, that liability should procure indemnification, obtained, as to them, the extension of this right of detainer; which was strengthened by that other principle of natural law, that no man should profit by another's labor, or obtain his property without recompense. The convenience of commerce and natural justice being on the side of liens,[3] the Courts leant that way; and liens were further recognized as existing, wherever a bailee for hire had incurred expense, or ameliorated an article.[4]

essent, ut ibi perpetuo essent, non temporis causa accommodarentur, obligatos. D. 20, 2, 5. Marcianus. Pomponius scribit, si gratuitam habitationem conductor mihi præstiterit, invecta a me domino insulæ pignori non esse. D. 20, 2, 3. Ulpianus. Si horreum fuit conductum, vel diversorium, vel area, tacitam conventionem de invectis, illatis etiam in his locum habere putat Neratius; quod verius est. D. 42, 5. 4 Poth. P. 36, Art. 2, Sect. 2. *Tale est Privilegium quod tribuitur creditori sumptuum funeris: de quo ita Marcianus.* Impensa funeris semper ex hæreditate deducitur, quæ etiam omne creditum solet præcedere, quum bona solvendo non sint. *Vid. et. auc. cit. in eod. loc.* et C. 3, 44; D. 11, 7. See also D. 4, 9; D. 19, 2; D. 16, 3, 8. Of course, the government had its own peculiar privilege. D. 42, 5, 38, 1. Respublica creditrix omnibus chirographariis creditoribus præferetur. D. 49, 14, 46, 3. Fiscus semper habet jus pignoris, &c. There was also a general distinction. (4 Poth. P. cit. ante, p. 37, sec. 3.) *Discrimen inter Privilegia* Causæ, *et privilegia* Personæ. Privilegia quædam CAUSÆ sunt, quædam PERSONÆ. Et ideo quædam ad heredem transmittuntur, quæ *causæ* sint; quæ *personæ* sunt, ad heredem non transeunt.

[1] Ld. Ray. 867; Yorke *vs.* Greenaugh. 6 T. R. 17, Kirkman *vs.* Shawcross. 3 B. & P. 42, Oppenheim *vs.* Russell. 8 Coke, 32 a, Calye's Case. Y. B. 22. H. 6, 21.

[2] Bac. Ab. Inns, D. "may detain person of the guest," cit. auth. This doctrine is now exploded, says Bronson, Ch. J. 3 Hill, 488, Grinnell *vs.* Cook. On the other hand, innkeepers were indictable for refusing to receive guests. Bac. Ab. Inns, C. 3; Comyn's Dig. Justices of Peace, D.

[3] Per Lord Mansfield, 4 Burrows, 2221.

[4] See Ca. Cit. ante; also 1 Atkyns, 228, E. P. Deeze. Yelv. 67, Hostler's case. Year Book, 5th Ed. 4, 2, 20. "*Nota*, also by Hayden, that a hostler may detain a

This latter class of liens embraced within it, all those which were recognised by usage of trade;[1] whilst the former was held to cover those, where possession was obtained by the exercise of a legal right; *e. g.*, a distress.[2]

Much of the conflict in the cases[3] has, doubtless, grown out of the inaccurate use of the word lien; particularly in not distinguishing a lien, which is a right given by law, from a pledge, or other right over property, given by contract. In fact, the two rights are not only distinct, but are inconsistent with each other, if not antagonistical. This may be seen in the remarks of Lord Kenyon, in *Walker* vs. *Birch;*[4] in which, after stating the well settled rule of law, "that a factor has a lien for his general balance on the property of his principal coming into his hands," and that "the question here arises on its application to this case," where there was "an express stipulation between the parties," he says, "The lien, which a factor has in the goods of his principal, arises from an agreement which the law implies; but an express stipulation, to the contrary, puts an end to the general rule of law. Here the parties are bound by an express stipulation, which excludes all ideas of a lien."

horse, if his master will not pay for his meat; the same law if a tailor make a garment for me, he may retain it until paid for his labor; and the same law if I buy of you a horse for twenty shillings. But if I am to pay you at Michaelmas next following, then you cannot detain the same until you are paid." In Davis *v.* Farr, (1. Harris, 169,) BURNSIDE, J. says, "Mechanics' Liens were unknown to the common law."

[1] 4 Burr. 2221, Green *vs.* Farmer, S. C. 1. Bl. R. 651. 6 T. R. 262, Walker *vs.* Birch.

[2] Bull. N. P. 45. 11 Mod. 89, Henly *vs.* Walsh, S. C. Salk. 686.

[3] See e. g., the cases cited in the note to 2 Gallison's R. 2d Ed. 485. Ex parte Lewis.

[4] 6 T. R. 262; see also note, ante p. 321.